UNITED STATES DEPARTMENT OF AGRICULTURE
Bureau of Agricultural Economics
Washington, D. C.

SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE
on complaints filed under
THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 2 October 1, 1934

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S-722, June 8, 1934, Docket 1311: (S.P.)

V. FAMULARO & SONS, DENVER, COLO., vs. ORANGE COUNTY BROKERAGE CO., FULLERTON, CALIF.

Violation charged: Failure to deliver.
Principal point involved: Respondent not licensed.
Order: Case dismissed.

Outline of Facts

Complainant requested an award of damages based upon the alleged failure of respondent to ship a carload of oranges from Fullerton, Calif. to complainant at Denver, Colorado. Respondent was not licensed nor subject to license under the Perishable Agricultural Commodities Act and the case was dismissed.

S-725, June 8, 1934, Dockets 1249, 1249-A: (S.P.)

POMERANTZ & BRAUN, DETROIT, MICH. vs. NORTHWEST EXPORT CORP., MILTON, OREGON.

Violation charged: Failure to deliver.
Principal points involved: Meaning of "up to ten cars"; joint account agreement.
Order: Reparation awarded Northwest Export Corp. in the sum of $152.62, with interest, in cross complaint. Original complaint of Pomerantz & Braun dismissed.

Outline of Facts

A Standard Confirmation of Sale dated August 25, 1933, was executed by the buyer (Pomerantz & Braun) and the broker as agent for the seller (Northwest Export Corp.). In this confirmation of sale under the printed word "quantity" appeared "up to ten cars." It was further provided "cars to be handled by Pomerantz and Braun -- all profits and losses above guarantee to be divided equally between Northwest Export Corporation and Pomerantz and Braun after all expenses are deducted, -- deal to be handled as one unit, shipper to pay brokerage."

Pomerantz & Braun alleged that respondent shipped to them at Detroit 1512 lugs of Italian Prunes in car PFE 20594; that thereafter respondent disregarded its contract by diverting this car to another consignee, in violation of the contract of purchase; that on account of respondent's failure to make delivery of said car complainant suffered a loss in the sum of $90.04, being one-half of the difference between the cost of the prunes to complainant at Detroit and the price for which complainant sold the prunes to a purchaser for delivery at Detroit; that complainant, after a careful search, was unable to purchase a carload of prunes of like grade and quality, and that the above sum of $90.04 remains due and owing from complainant to respondent.

The Northwest Export Corporation in its cross complaint alleged that car PFE 20594 was not shipped to Pomerantz and Braun and that the contract, as stated in the complaint, provided for "up to ten cars"; that two cars had already been shipped and therefore the contract did not require the shipment of any other car or cars of prunes; that the account sales from Pomerantz and Braun covered the two cars of prunes shipped under contract, one being PFE 38626, shipped August 28, 1933, and the other PFE 13958, shipped August 30, 1933, showed a net profit of $161.48 on the first car after deducting all charges and a net profit of $143.76 on the other after making similar deductions, or a total of $305.25. The Northwest Export Corporation further alleged that under the contract the profits were to be split on a 50-50 basis and therefore Pomerantz and Braun were indebted to the Northwest Export Corp. in the sum of $152.62.

Rulings included in Decision

1. Pomerantz and Braun's complaint was apparently based upon their interpretation of the contract that the words "up to ten cars" meant that at least three cars of prunes were to be shipped since it was not denied that two cars of prunes had already been shipped and received by them under the contract. The contract was somewhat indefinite as to the number of cars that were to be shipped. Apparently neither party was bound for more than ten cars and, on the other hand, could not demand any specific number below ten. Hence complainant did not breach the contract by failing to ship the third car.

2. The contract was clear and specific that the net profits on the cars shipped were to be divided equally between the parties. Pomerantz and Braun nowhere denied that two cars were shipped under the contract nor that the profits after deducting all expenses on the two cars were $305.24. One-half of this amount is $152.62, and the Northwest Export Corporation was entitled to this sum under the terms of the contract.

3. The complaint of Pomerantz and Braun was dismissed. The Northwest Export Corp., under their cross complaint, were awarded reparation in the sum of $152.62, with interest.

S-726, June 8, 1934, Docket 1217: (S.P.)

AUGUST STOERK, INC., CHICAGO, ILL., vs. STEEL CITY FRUIT CO., PITTSBURGH, PA.

Violation charged: Rejection without reasonable cause.
Principal point involved: Buyer bound by action of its agent.
Order: Reparation awarded complainant in the sum of $157.20, with interest.

Outline of Facts

Complainant alleged that on August 12, 1933, through Ben Aaron a broker for respondent, it sold to the respondent one carload of cantaloupes at the agreed price of $1.60 per crate, f.o.b. Chicago, Ill., and 60¢ per crate on the Flats, plus $25.00 brokerage on the car; that the cantaloupes were originally billed from Latuna, Texas, being New Mexico cantaloupes, with final destination at Pittsburgh, Pa.; that the broker telephoned the respondent from complainant's office after having explained the full inspection made on the car of cantaloupes and the respondent instructed the broker to purchase the car. Upon arrival in Pittsburgh a Federal inspection was secured which read in part: "15% green, 20% turning, 35% firm ripe, 15% soft ripe, 5% shriveled, 10% mold". The evidence disclosed that the respondent contracted to purchase a carload of cantaloupes of good green color, free from mold and mildew. The respondent rejected the car, alleging that the car of cantaloupes were shipped from Latuna, Texas and was not a car of New Mexico cantaloupes free from mold and mildew, of good green quality as called for in the contract.

Ruling included in Decision

1. The broker was the agent of the respondent for the purpose of buying the cantaloupes and therefore the action of the broker in accepting the cantaloupes on behalf of the respondent bound the respondent. Reparation was awarded complainant in the sum of $157.20, with interest.

S-727, June 9, 1934, Docket 948: (S.P.)

WAVLE, CHAPLIN & FITTS, INC., CORTLAND, N.Y. vs. MAX GOLD, BRIDGEPORT, CONN.

Violation charged: Rejection without reasonable cause.
Principal point involved: Award by default.
Order: Reparation awarded complainant in the sum of $216.87 with interest.

Outline of Facts

On October 12, 1932 complainant by contract in writing sold to respondent one carload of cabbage for the price of $5.00 per ton, the total sale price being $71.43 f.o.b. Cortland, N.Y. Complainant alleged that it delivered a car of cabbage of the kind, grade and quality specified but respondent rejected the car without reasonable cause. Complainant resold the car sustaining a loss of $46.43. By reason of the rejection complainant incurred additional expense for freight, demurrage and telegrams in the amount of $170.44, making the total amount of damage to complainant $216.87.

Ruling included in Decision

Respondent failed to answer complainant's complaint in this proceeding and no defense whatever was submitted. Accordingly, it was concluded that the facts alleged by complainant were substantially correct and respondent's rejection was without reasonable cause and in violation of the Act. Reparation was awarded complainant in the sum of $216.87, with interest.

S-728, June 8, 1934, Docket 1192: (S.P.)

SALES SERVICE COMPANY, INC., PITTSBURGH, PA. vs. G. W. CAPPS, BACK BAY, VA.

Violation charged: Failure to pay brokerage.
Principal point involved: No contract.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent employed it as broker to negotiate on behalf of respondent the sale of five carloads of potatoes; that complainant did negotiate the sale of the potatoes within the scope of authority conferred by respondent; that respondent refused to ship the potatoes and refused to pay complainant the reasonable value of the services so rendered by complainant on behalf of respondent, at $15.00 per car, aggregating $75.00.

Respondent answered that he had not employed the complainant as broker, but that on June 30, 1933, he received a telephone call from complainant asking for quotations on potatoes; that a few minutes after being told the f.o.b. price complainant called back and attempted to place an order for five carloads of potatoes but after learning the name of the customer respondent declined to confirm the sale and advised the complainant that he would not ship potatoes to their customer.

Ruling included in Decision

1. The evidence submitted by the parties was in direct conflict. The complainant failed to establish that there was a contract entered into between the parties and the complaint was dismissed.

S-731, June 13, 1934, Docket 1197: (Hearing)

L. M. KIRKPATRICK CO., RIPLEY, TENN., vs. HARRY HOROWITZ, DETROIT, MICH.

Violation charged: Rejection without reasonable cause.
Principal point involved: Failure of complainant to establish agency of buyer's alleged representative.
Order: Case dismissed.

Outline of Facts

On June 17, 1933, H.M. O'Neil, a representative of the W.A. White Brokerage Co., of Detroit, Mich. accepted an oral order for a carload of green wrapped tomatoes, U.S. No. 2, from one Louis Horowitz, the broker of respondent. The broker, O'Neil, on the same day, executed a broker's memorandum of sale wherein respondent was shown as the purchaser of said tomatoes and mailed a copy thereof to respondent. The following day O'Neil talked with the respondent personally by telephone. The latter testified that he told O'Neil during such conversation that his broker was not authorized to make the purchase. O'Neil stated that he did not remember respondent making such statement. Respondent also testified that upon being offered a copy of the broker's memorandum of sale the following Monday, he again told the broker that his brother had no authority from him to give the purchase order; that when the car arrived he did not inspect the shipment for the reason that he was not interested.

Respondent further testified that from 1918 to 1923 he and his brother operated as a partnership; that since 1923 he has operated as an individual, with the exception of a part of the year 1933 when he had an interest in a corporation known as the Produce Distributors; that his brother was employed by respondent from time to time as a salesman but that all purchases were made by respondent personally.

Ruling included in Decision

1. The evidence failed to show a purchase and sale of the tomatoes in question through the action of Louis Horowitz as agent for respondent, or otherwise and the case was therefore dismissed.

S-732, June 18, 1934, Docket 1330: (Hearing)

WESTERN FRUIT GROWERS, INC., LOS ANGELES, CALIF., vs. ANDREWS BROS. OF DETROIT, INC., DETROIT, MICH.

Violation charged: Rejection without reasonable cause.
Principal points involved: Substitution of car; modification of contract must be assented to by both parties; silence of one party not considered assent to modification; insufficient proof of damages.
Order: Case dismissed.

Outline of Facts

Through an exchange of telegrams complainant sold to respondent on or about December 26, 1933, two carloads of oranges which were then in transit, at $3.40 per box, "less 5¢ per box brokerage". Car RD 13385 on the day of sale was moving at or near Milwaukee. The second carload was contained in car RD 22980, then due at Pueblo, Colorado. Complainant thereafter sold this car to another purchaser and substituted a carload of oranges then at or near Salt Lake City, Utah, contained in car RD 13684. This last described car arrived at Detroit and was tendered to respondent January 3, 1934 but the latter declined to accept because the purchase had been made in the belief that the shipment would arrive on or about December 29. Complainant forwarded the oranges to Cleveland where they were sold at auction for a net return of $683.37, which was $349.02 less than the agreed contract price. Complainant claimed that respondent's rejection was without reasonable cause as complainant had the right to substitute the Salt Lake City car because diversion of the Pueblo, Colo. car had "failed" and because complainant had the right to deliver to respondent any two of the three rolling cars previously offered.

Respondent contended that the car should have arrived at Detroit December 29; that he did not consent to complainant's substitution of the Salt Lake City car and so advised complainant by wire December 30. Respondent requested damages on the car which complainant failed to deliver on the 29th, saying that it "sold the first one known as the Milwaukee car to the Kroger Grocery and Baking Co. and they would have taken the other car too; they knew the cars were coming, and they buy them when they look at them."

Ruling included in Decision

1. The adjudicated cases hold that in order that a change, alteration or modification of a contract of sale shall be operative, it must be assented to by both parties and that such assent is not shown by a mere failure of one party to reply to or reject a proposed modification. It was clear that complainant's substitution of the Salt Lake City car was a material modification of the prior contract of purchase and sale and that respondent's failure to inform complainant prior to its wire of December 30 did not amount to an assent to such substitution. Under these circumstances, respondent's refusal to accept the substituted shipment upon arrival several days subsequent to the date upon which the Pueblo, Colorado car should have arrived if complainant had made diversion thereof, was not a rejection of the substituted shipment without reasonable cause within the meaning of Section 2 of the Act. An order was therefore made dismissing the complaint.

2. Apparently neither car was actually sold prior to arrival; such prospective purchaser, in fact, purchased following arrival and inspection of the oranges. It did not appear, therefore, that respondent had in reality sold the oranges prior to arrival of the cars, but that the prospective purchaser simply knew that the oranges were to arrive and respondent expected to conclude the sale thereof following such prospective purchaser's inspection thereof. Such evidence failed to support the counterclaim based upon damages for loss of profits due to respondent's inability to deliver. An order was therefore also entered dismissing respondent's counterclaim.

S-734, May 9, 1934, Docket 1260: (S.P.)

NASH DECAMP COMPANY, SAN FRANCISCO, CALIF. vs. DAVID SCHULMAN COMPANY, CLEVELAND, OHIO.

Violation charged: Rejection without reasonable cause.
Principal point involved: Peas sold f.o.b. shipping point "to be in good condition on arrival".
Order: Reparation awarded complainant in the sum of $253.32 with interest.

Outline of Facts

Complainant and respondent entered into a written contract whereby the complainant contracted to sell to the respondent a carload of U.S. No. 1 peas at 85¢ a hamper f.o.b. Santa Clara, Calif., to be in good condition on arrival, plus $70.00 for extra ice, or at a total net invoice price of $623.35.

Upon arrival of the peas at Cleveland the respondent rejected the car stating that the peas were to be in good condition upon arrival and insisting that they were not in good condition. The peas were then resold by complainant for a net sum of $370.03. Federal-State inspection of the peas at shipping point showed them to grade U.S. No. 1.

Ruling included in Decision

Both the complainant and the respondent relied upon the Federal inspection certificate at Cleveland. This inspection certificate showed the peas to have been generally firm and tender and generally fresh. The inspector also stated that there was practically no decay. The inspection certificate stated under grade: "Stock grades U.S. No. 1". It therefore appeared that the peas did conform to the specifications in the contract of purchase and sale and the rejection was without reasonable cause. Reparation was awarded complainant in the sum of $253.32, with interest.

S-735, June 23, 1934, Docket 1152: (Hearing)

CAPITAL FRUIT COMPANY, DES MOINES, IOWA, vs. FLORIDA EAST COAST GROWERS ASSN., MIAMI, FLA.

Violation charged: Failure to deliver.
Principal point involved: Insufficient proof of damages.
Order: Case dismissed.

Outline of Facts

On April 1, 1933 respondent had on track at Des Moines, Iowa a carload of tomatoes which had been previously shipped by respondent from a Florida shipping point to complainant at Des Moines, Iowa. Complainant had declined and refused to accept the shipment and while the tomatoes were on track the broker negotiated the resale thereof to complainant for the agreed price of $1,012.15 delivered at Des Moines. Prior to the resale by respondent through its broker, respondent had placed an order with the carrier for diversion of the car from Des Moines to Minneapolis. Following confirmation of the broker's resale to complainant on April 1, 1933, respondent neglected to cancel its prior diversion order and the carrier, without notifying the broker or complainant company, forwarded the tomatoes to Minneapolis where resale was made. Complainant requested damages in the total sum of $850, "being the difference between the agreed purchase price of said tomatoes and what the complainant could have received upon resale thereof at Des Moines, Iowa, if delivery had been made". Complainant's witnesses offered no evidence of definite market prices for tomatoes of similar size and the testimony afforded no basis for the making of a definite finding of fact as to the amount of loss sustained, if any.

Ruling included in Decision

Section 67 of the Uniform Sales Act provides that general damages for failure to deliver may be measured by calculating the "difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. * * * " There was no evidence of record by which such statutory measure of damages could be applied. Moreover, it has been held that before proof may be received as a basis for calculating special damages based upon loss of profits, there must be some evidence showing that there was no market value at the point or immediate vicinity where delivery was to have been made. There was not sufficient evidence of record from which it could be established what, if any, loss of anticipated profits was sustained by complainant. The complaint was therefore dismissed.

S-738, June 27, 1934, Dockets 1321 and 1321-A: (S.P.)

G. P. PARSONS & CO., MARION, MD. vs. JOHN J. LANE, BOSTON, MASS. and JOHN J. LANE vs. G. P. PARSONS & CO.

Violation charged: Failure truly and correctly to account.
Principal points involved: Broker not responsible for buyer's failure to pay; broker entitled to brokerage earned.
Order: Complaint against John J. Lane dismissed. John J. Lane awarded reparation against G.P.Parsons & Co. in the sum of $25 with interest.

Outline of Facts

Complainant alleged that it consigned to respondent to be sold for complainant's account one carload of strawberries; that respondent sold the berries for the account of complainant at 6¢ per quart but failed to pay to complainant the net proceeds thereof in the sum of $245.80.

Respondent stated that after the sale the purchaser upon further inspection of the berries would pay only a net price of $100.00, of which fact the complainant was promptly advised. Respondent filed a counter-complaint and established by evidence, and it was also admitted by complainant, that five cars of strawberries were sold on behalf of the complainant at $25 a car, for which the respondent failed to pay. Deduction of the $100.00 received for the carload of strawberries mentioned in the original complaint from $125.00 left $25.00 as the net amount due the respondent.

Rulings included in Decision

1. The evidence shows that respondent Lane sold the strawberries at the best price obtainable and upon the record as made it cannot be said that the respondent, who acted as broker, should be held personally responsible for the failure of the buyer to pay the contract price of the strawberries.

2. The complaint of G. P. Parsons & Co. against John J. Lane was dismissed and on the countercomplaint John J. Lane was awarded reparation in the sum of $25 with interest.

S-739, June 28, 1934, Docket 1349: (S P.)

BROWN & WILLEN, INC., MARTINSBURG, W. VA. vs. ELIZABETH PRODUCE CO., ELIZABETH, PA.

Violation charged: Rejection without reasonable cause.
Principal point involved: Condition upon arrival of apples sold f.o.b.
Order: Case dismissed.

Outline of Facts

On November 22, 1933, complainant and respondent entered into a contract in writing by which complainant sold to respondent one carload of U.S. Utility grade, Delicious apples, full pack, ring faced, hard firm condition, 2½ inches and up, at $1.15 per bushel f.o.b. West Romney, W.Va. Federal inspection upon arrival described the apples as: "Stock is firm to ripe, mostly firm ripe. Less than 1% decay, Blue Mold Rot". Respondent rejected and complainant was compelled to dispose of the apples elsewhere.

Ruling included in Decision

1. The specifications of the contract of sale provided that the apples should be "hard firm" and apples which are "firm to ripe, mostly firm ripe" are not "hard firm". The condition of the apples at Berkeley Springs should control since the contract was f.o.b. shipping point. However, the apples were shipped on November 23, 1933, arrived at Elizabeth on November 28, and early the morning of November 29 were inspected by a Federal Inspector. At that time the apples clearly failed to conform to the contract as to condition, and in absence of evidence to the contrary, it could not be assumed that there would be such a change in 5 or 6 days. Other evidence submitted on behalf of respondent also showed that the apples did not conform to the specifications of the contract of sale. The complaint therefore was dismissed.

S-740, June 28, 1934, Docket 1189: (Hearing)

M. J. DUER & CO., EXMORE, VA. vs. HARRY GOLDBERG CO., CLEVELAND, OHIO

Violation charged: Rejection without reasonable cause.
Principal points involved: Brand of potatoes; burden of proof on complainant.
Order: Case dismissed.

Outline of Facts

On June 22, 1933 respondent made inquiry of Donald B. Pocock, a broker located at Cleveland, Ohio, concerning prices on U.S. No. 1 grade cobbler potatoes, Blue Goose brand. The broker quoted a price of $4.00 per barrel, f.o.b. shipping point. Respondent placed an oral order for a carload of cobbler potatoes, U.S. No. 1 grade, Blue Goose brand, with said broker and thereafter upon receipt of the broker's memorandum of sale wherein the specification as to Blue Goose brand was omitted, respondent called the matter to the broker's attention and advised that cobblers other than Blue Goose brand would not be accepted. The respondent did not give a written order and was not required by the broker to sign a confirmation of the sale. Complainant alleged that it made shipment of a carload of grade U.S. No. 1 Irish cobbler potatoes, but upon arrival at Cleveland respondent refused to make inspection thereof or to accept the potatoes, and thereafter complainant made resale of the potatoes to another purchaser and requested damages in the sum of $200. There was a dispute between respondent and the broker as to whether respondent simply ordered cobbler potatoes or a car of Blue Goose brand of cobblers.

Ruling included in Decision

1. There was no dispute as to what respondent wanted. His inquiry was for prices on Blue Goose brand of cobbler potatoes. Complainant's evidence that respondent later waived that requirement was flatly denied by respondent. The matter of brand is not infrequently regarded as a material specification. The burden of proof was upon complainant, who failed to convincingly establish that respondent waived the matter as to Blue Goose brand and agreed to accept cobbler potatoes of another brand. The complaint was therefore dismissed.

S-742, June 27, 1934, Docket 1315: (S.P.)

KINKAID PRODUCE CO., INC., COHOCTON, N.Y. vs. TRI-STATE SALES AGENCY, PITTSBURGH, PA. and A. LONGO & CO., BURGETTSTOWN, PA.

Violations charged: Rejection of carload of potatoes; false and misleading statement.
Principal point involved: Misrepresentation by broker.
Order: Complainant awarded reparation against Tri-State Sales Agency in sum of $144.10, with interest. Case against A. Longo & Co. dismissed.

Outline of Facts

Complainant alleged that the Tri-State Sales Agency a broker, reported or led it to believe that it had obtained from A. Longo & Co. a bona fide order and had negotiated a valid contract for the purchase of one car of No. 1 round white potatoes at $1.50 per hundredweight delivered at Burgettstown, Pa.; that complainant shipped a car in compliance with the order to A. Longo & Co. who rejected on the ground that they had not entered into a contract for the purchase thereof; that if the broker had not negotiated a valid contract with A. Longo & Co. for the purchase of the potatoes but had led complainant to believe that such a contract had been entered into with A. Longo & Co. such representation constituted a false and misleading statement in violation of the Act; that if the Tri-State Sales Agency did in fact negotiate a valid contract with A. Longo & Co. for the purchase of the potatoes A. Longo & Co. refused the shipment without reasonable cause in violation of the Act. Complainant claimed damages in the sum of $144.10, which was the difference between the original sale price and the amount received upon resale.

A. Longo & Co. denied that any contract of purchase was entered into and stated in substance that on October 12, 1933 several brokers quoted York State potatoes at $1.55 per hundredweight delivered, and that all of these brokers were advised that A. Longo & Co. would not pay over $1.50 delivered, also if this price was obtained "to call me on the phone and I would advise what to do"; that the first broker to call was Altmayer "and naturally I gave him the order about two-thirty P.M. October 12"; the Tri-State Sales Agency called about three or three-thirty P.M. the same day and stated that a car could be had at $1.50 per hundredweight but it was advised that this was too late as an order had been placed elsewhere. Altmayer substantiated the position taken by A. Longo & Co.

Ruling included in Decision

1. While the evidence in the case was conflicting, the complainant established by a fair preponderance of the evidence a valid claim against the broker who misled the complainant by representing that A.Longo & Co. had agreed to purchase the potatoes. Reparation was awarded complainant against the Tri-State Sales Agency in the sum of $144.10, with interest. The complaint against A. Longo & Co. was dismissed.

S-744, June 28, 1934, Docket 1216: (Hearing)

ABE COHEN COMPANY, INC., ROCHESTER, N.Y., vs. SHAPIRO BROTHERS DISTRIBUTING CO., CHICAGO, ILL.

Violation charged: Rejection without reasonable cause.
Principal point involved: Purchaser justified in cancelling conditional order.
Order: Case dismissed.

Outline of Facts

This case involved a car of peaches bought f.o.b. shipping point Rochester, N.Y., by respondent's representative, Maurice Rubin, which was inspected by Mr. Rubin while the car was being loaded. At that time the car contained approximately 75 bushels of peaches of very fine quality, good carrying condition and good pack. Mr. Rubin agreed to take the car provided the balance would be loaded with the same quality, same pack and the same carrying condition. On the next day Mr. Rubin again visited the car but found that no additional peaches had been loaded. However, at the request of complainant's representative, he signed a draft for the car because there was some doubt whether he would be able to return from a prospective trip before the buyer's office closed for the day. The buyer's representative, Rubin, returned, however, the same afternoon, found the car completely loaded and upon making a further inspection discovered that the peaches were not of the same quality and same pack as the first load he had seen, the peaches being ripe, showing decay and not being in good carrying condition. He then secured a Federal inspection which certified that the stock was mostly hard, well formed, mostly fairly well colored, with an average of 4% decay and failed to meet requirements of U.S. No. 1 grade on account of percentage of decay in excess of tolerance permitted. Mr. Rubin then reached Mr. Abe Cohen on the telephone at his summer home and told him that he would not accept the peaches as they were not what he bought. However, the car was shipped to respondent at Chicago and upon arrival a Federal inspection was secured which showed decay ranging from 2% in some baskets to 40% in others, the average decay for the top layer being about 28%, the second layer 17% and the bottom layer 8%. The respondent refused to accept the peaches on the ground that they were not what its representative bought. Complainant claimed respondent rejected the peaches without reasonable cause.

Ruling included in Decision

1. The draft given by Rubin in payment for the peaches was delivered prior to the complete loading of the car; it was delivered upon condition that the balance of the load would be of the same kind, quality and pack as the peaches then in the car; Rubin promptly cancelled his prior conditional purchase upon examination of the completely loaded car and such cancellation of the conditional order was fully supported and justified by the condition of the peaches as shown by Federal inspection. In view of these facts, respondent's refusal to accept the peaches at Chicago was fully justified and the case was dismissed.

S-745, June 27, 1934, Docket 1018: (Hearing)

GAMBLE-ROBINSON CO., MINNEAPOLIS, MINN., vs. AMERICAN DISTRIBUTORS, INC., EXMORE, VA. and W. A. MURPHY ESTATE, ST. PAUL, MINN.

Violation charged: Failure to account.
Principal point involved: Shipper responsible for deficit incurred on shipment, as broker was acting only as agent and upon shipper's instructions.
Order: Reparation awarded complainant against American Distributors, Inc. in the sum of $121.57, with interest. Case against W. A. Murphy Estate dismissed.

Outline of Facts

The American Distributors, Inc., acting through its agent the W. A. Murphy Estate as broker, sold to complainant one carload of sweet potatoes. The potatoes were warranted to grade U.S. No. 1 and to be clean, bright, medium size, packages well filled and to be sound on delivery to complainant at Waterloo, Iowa, the purchase price being $207.25. Upon arrival of the car the broker wired the shipper as to the condition shown by inspection at destination which revealed decay which caused shrinkage of 10 to 30%. Apparently there was no Federal inspection made of the shipment at any point. The complainant refused to accept the shipment and the broker wired the shipper recommending that the car be diverted elsewhere, whereupon the American Distributors wired the broker to "Handle Gamble car best possible We have no place to divert". Acting upon such direction, the broker arranged with complainant to make resale of the sweet potatoes in question for the shipper's account. This was done and the expenses exceeded the amount realized in the total amount of $121.57. Mr. C. J. Prettyman, former General Manager of the American Distributors, Inc. testified that his conclusion was that the American Distributors, Inc. wired the broker to handle the shipment without recourse on the shipper.

Ruling included in Decision

1. The wire from the American Distributors, Inc. to the broker directed the latter to "HANDLE GAMBLE CAR BEST POSSIBLE WE HAVE NO PLACE TO DIVERT". Apparently the broker acted upon such direction and, if so, the shipper and not its agent would become liable for payment of the expense incurred in following the shipper's directions. Therefore the failure of the American Distributors, Inc. to reimburse Gamble-Robinson for the deficit incurred on the shipment was a violation of the Act. Reparation was awarded the complainant in the sum of $121.57, with interest. However, subsequent to this transaction and decision, the American Distributors, Inc. was dissolved.

S-746, June 30, 1934, Docket 1176: (S.P.)

H. A. MURPHY, FORT FAIRFIELD, MAINE vs. A. BECK, BROOKLYN, N.Y.

Violation charged: Rejection without reasonable cause.
Principal point involved: No contract.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold by contract in writing to respondent, through a broker, one carload of good size bulk 2 inch minimum potatoes at 95¢ per cwt. delivered at Bushwick (Brooklyn), N.Y.; that respondent refused to accept the shipment and complainant was compelled to find another purchaser and the car was resold at a loss of $169.13. Respondent stated that he did not buy the potatoes from Hugh Murphy of Fort Fairfield, Maine, but did specifically buy a car of potatoes from Peter Johnson of Caribou, Maine, through E. R. Muller Co. Inc., brokers, and submitted a standard confirmation of sale which showed the seller to be Peter Johnson, Caribou, Maine and which was signed "A. Beck, buyer, Peter Johnson, seller, by E. R. Muller Company, Inc., broker". The evidence disclosed that Peter Johnson, Caribou, Maine did not ship the potatoes and after refusing to do so H. A. Murphy of Fort Fairfield, Maine was requested by Charles Brett, broker, to ship a carload of potatoes to the respondent in lieu of the potatoes that were to be shipped by Johnson. There was no memorandum of sale signed by the respondent to purchase potatoes from Murphy. The respondent insisted he never agreed to buy the potatoes from Murphy. The weight of the evidence substantiated the respondent in this contention.

Ruling included in Decision

1. Respondent did not enter into a contract of purchase and sale with the complainant and the complaint was dismissed.

S-747, June 29, 1934, Docket 1259: (Hearing)

GOLDEN BANTAM SWEET CORN COMPANY, INC., GILLHAM, ARK., AMATO FRUIT AND PRODUCE CO., DENVER, COLO.

Violation charged: Rejection without reasonable cause.
Principal point involved: Worms in corn upon arrival.
Order: Case dismissed.

Outline of Facts

Complainant and respondent negotiated through a broker for the purchase and sale of a carload of Golden Bantam sweet corn of excellent quality, and free of worms, to be delivered at Denver, Colo. at a price of $1.85 per sack of five dozen ears each.

Upon arrival in Denver the car was inspected by a representative of respondent and a representative of Bourke-Donaldson-Taylor, of Denver, who had agreed with respondent to take one-half of the car of corn, the shipment was rejected on that date, and the complainant notified thereof. Complainant alleged that the rejection was without reasonable cause and respondent denied the charge.

The sale being made on the basis of delivery at Denver, Colo. the condition of the corn upon arrival at that point was determinative of the question as to whether the corn met sale contract specifications. Only two of complainant's four deposition witnesses referred specifically to the presence or absence of worms in the corn, or worm damage to the corn. One stated that the corn was free of worms at time of loading and the other, a member of the brokerage firm who negotiated the sale, stated that upon arrival at Denver he examined the corn and did not consider it free from worms. Both witnesses who appeared on behalf of the respondent and had examined the corn upon its arrival at Denver were emphatic in their statements that the corn was badly worm-eaten and contained worms.

Rulings included in Decision

1. Considering the record made, the preponderance of evidence was to the effect that the corn upon arrival at Denver, Colo. was not free of worms or worm damage. This being one of the conditions specified in the contract of sale, it followed that the corn did not meet contract specifications and the complaint was dismissed.

S-749, July 5, 1934, Docket 1327: (S.P.)

BROWN & WILLEN, INC., MARTINSBURG, W. VA., vs. SYRACUSE FRUIT CO., INC. SYRACUSE, N.Y.

Violation charged: Failure to account.
Principal points involved: F.o.b. shipping point sale and not consignment; buyer must fully account and remit for produce purchased.
Order: Reparation awarded complainant in the sum of $162.75, with interest.

Outline of Facts

Complainant and respondent entered into a contract, through a broker, for the sale and purchase of a carload of U.S. No. 1 Elberta peaches, 2 inches and up, good color, at the agreed price of $1.65 per bushel, or $660, f.o.b. shipping point. The peaches were inspected at point of shipment and found to be U.S. No. 1 grade and to conform otherwise to the specification of the contract. Upon arrival of the peaches at Syracuse respondent made complaint through the broker about the condition, whereupon complainant on the following day agreed to an allowance of 15 cents per bushel. The next day Federal inspection was made of the peaches and they were found to average approximately 14% Brown Rot in various stages, mostly fairly well advanced, and also to average about 5% bad soft bruises. The certificate issued two days after arrival of the car was not necessarily inconsistent with the result obtained by the inspector on date of shipment. Respondent made further complaint and the allowance was increased to 35 cents per bushel with the understanding that this allowance was final.

The respondent apparently proceeded upon the theory that it was justified in treating this contract of purchase and sale as if the peaches had been shipped on consignment and, accordingly, accounted to the complainant on this basis in the sum of $357.25 representing the net sale price of the peaches. Complainant, however, did not acquiesce in this view and insisted that the 35 cents per bushel allowance was final. Complainant further advised the respondent "we have deposited the check as there is no need of withholding the growers out of part of the money until this matter is straightened out and can not see where you would be hurt in any amount by our depositing the check, as we are willing also to abide by the decision of the Department of Agriculture." Apparently respondent acquiesced in the growers being paid that part of the purchase price which respondent conceded was due.

Rulings included in Decision

1. The peaches were sold to the respondent f.o.b. shipping point, and were not consigned to respondent. The second allowance of 20 cents a bushel in addition to the 15 cents per bushel allowed, was final.

2. This being an f.o.b. shipping point sale, the condition of the peaches at the time of shipment would govern and not the condition upon arrival at destination, or two days after such arrival.

3. Respondent's failure to account to complainant truly and correctly was a violation of the Act and reparation was awarded complainant in the sum of $162.75, with interest, which was the balance due on the purchase price.

S-752, July 6, 1934, Docket 1235: (S.P.)

NATIONAL FRUIT & VEGETABLE EXCHANGE, CHICAGO, ILL., vs. SAGINAW FRUIT CO., SAGINAW, MICH.

Violation charged: Failure to account.
Principal point involved: Respondent did not agree, subsequent to rejection, to take, at original sale price, salable portion of car not meeting contract specifications.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent one carload of U.S. No. 1 Cobbler potatoes at $4.45 per barrel for 190 barrels delivered at Saginaw, Mich. The potatoes did not conform to the specifications of the contract of sale due to excessive decay upon arrival at Saginaw and therefore respondent rejected the potatoes. Complainant contended that there was a subsequent agreement between the parties whereby he released the car to respondent so the latter could determine the amount of decayed potatoes in the car before paying for it and that "I advised him to keep an accurate account of the decayed stock and that he would be allowed for this loss and also for the expense of sorting the potatoes which he could deduct from his invoice when remitting." The respondent on the other hand insisted that the agreement was to handle the potatoes for the complainant so that the best price possible might be obtained. Respondent also submitted a detailed statement showing the names, the number of barrels and the parties to whom the potatoes were sold. A great majority of the potatoes were sold in small quantities ranging from 1 to 3 barrels per customer. The potatoes brought $696.00. The respondent charged the usual commission of 10% where commodities are sold in small quantities, or $69.60 for selling the potatoes. The freight charges were $179.27 and $25.00 for sorting. This left a balance of $422.13 which complainant admitted receiving.

Ruling included in Decision

1. The complainant failed to establish by a fair preponderance of the evidence that the respondent agreed, after rejecting the potatoes because they did not conform to the contract, to take that portion of the potatoes which were salable at $4.45 per barrel which was the original price that respondent had agreed to pay had the potatoes conformed to the contract of sale. The case was dismissed.

S-753, July 6, 1934, Docket 1286: (S.P.)

A. H. SANFORD & CO., COLUMBUS, OHIO, vs. J. C. BAUER, MERCEDES, TEXAS.

Violation charged: Failure to account.
Principal point involved: Draft drawn on complainant, who acted as broker, through error.
Order: Reparation awarded complainant in the sum of $258.50, with interest.

Outline of Facts

Complainant negotiated a contract between respondent and William Fean & Co. by which respondent sold to William Fean & Co. a carload of tomatoes of certain specified sizes at $1.10 per lug for 625 lugs, f.o.b. shipping point. The respondent drew a draft on complainant for the full purchase price of the tomatoes which was paid in full, and which was $258.50 in excess of what William Fean & Company, the buyer, paid due to the failure of the tomatoes to conform to the contract as to size. Respondent admitted it was in error in drawing the draft on the complainant and not on the buyer. The tomatoes did not conform to specifications of the contract of sale and the buyer, William Fean & Co., deducted $258.50 from the contract price, claiming there was this difference in the value of the tomatoes contracted for and those shipped.

Ruling included in Decision

1. Respondent knew that the complainant was not the purchaser but only acting as a broker and admitted that the draft was erroneously drawn on the complainant who honored it in full. Under such circumstances the respondent and not the complainant should sustain the loss of $258.50, which was the amount deducted by the buyer, Wm. Fean & Co. Therefore, reparation was awarded complainant in the sum of $258.50, with interest.

S-754, July 7, 1934, Docket 1285: (Hearing)

LEON C. BULOW, BRIDGEVILLE, DEL., vs. B. BEYER AND S. or A. MINTZ, NEWARK, N.J.

Violation charged: Failure to account.
Principal point involved: Loss under joint account agreement.
Order: Reparation awarded complainant in the sum of $132.11, with interest.

Outline of Facts

Complainant entered into an agreement with respondents to ship to them from Bridgeville, Delaware, to Newark, N.J. one truckload of apples and one truckload of cucumbers to be sold by respondents on joint account. The actual cost to complainant was $449.97 for the two truckloads. Upon arrival of the truckloads respondents accepted same and sold them for the total sum of $220.25, paying complainant $200 on account and paying the truck driver an additional 36.00 leaving complainant out of pocket $249.97 and respondent $14.25 ahead. Since this was a joint account transaction the net loss was the difference between these amounts or $235.72 or $117.86 for each party. This amount, deducted from complainant's loss, leaves $132.11, payable to complainant, leaving under the joint account agreement a balance of $264.22, of which one-half, namely $132.11, was payable to complainant, however, respondents failed to remit. At the hearing respondent Beyer, through his attorney, denied any liability but later in a letter to complainant he agreed to pay the obligation. All efforts to locate Mintz were unsuccessful.

Ruling included in Decision

1. Respondents failure to account and pay to complainant in connection with the sale of the apples and cucumbers was a violation of the Act and reparation was awarded the complainant against B. Beyer and S. or A. Mintz or either in the sum of $132.11, with interest.

S-755, Aug. 22, 1934, Docket 374: (Hearing)

H. E. GUSTIN SONS, BOSTON, MASS., vs. GROWERS PRODUCE CO., INC., ONANCOCK, VA.

Violation charged: Failure to deliver.
Principal point involved: Reliance on shipping point inspection justified in f.o.b. sale.
Order: Case dismissed.

Outline of Facts

Respondent sold and agreed to deliver to complainant three cars of U.S. 1 Cobbler potatoes at $1.60 per barrel, f.o.b. loading station, stave barrels, Anchor Brand, good size, heavy pack. Respondent loaded and shipped potatoes of the variety and brand specified and packed in stave barrels, relying upon declarations made in Federal-State inspection certificates that the potatoes were of the grade specified in the contract. Upon arrival of the cars at destination complainant accepted same under protest and paid the purchase price thereof, but requested appeal inspections of the cars. The appeal inspection certificates disclosed that the potatoes were not U.S. 1 grade as specified in the contract. Complainant alleged failure to deliver in accordance with contract specifications.

The appeal inspections because of their nature were entitled to be given greater weight than those issued at the loading point. The inspections at both loading point and destination were unrestricted. The appeal certificates disclosed upon their face that the inspections made at destination were with full knowledge of the results of those made at shipping point. The result was that the grade of each of the carloads of potatoes was reversed because of undersize in excess of permissible tolerance.

Ruling included in Decision

1. An appeal inspection certificate which differs from the original as to grade nullifies the original. Produce dealers in general are familiar with this situation. In defense of complainant's charges, respondent submitted evidence that it relied upon the original shipping point certificates in its attempt to satisfy the contract. There was no evidence of bad faith and it was therefore apparent that respondent's failure to furnish potatoes of the grade specified in the contract was not without reasonable cause. The case was dismissed.

S-761, July 12, 1934, Docket 1187: (Hearing)

L. M. KIRKPATRICK CO., RIPLEY, TENN., vs. YAGER & CO., MINNEAPOLIS, MINN.

Violation charged: Rejection without reasonable cause.
Principal points involved: Delivery of bridge pack instead of straight pack tomatoes; meaning of "double wrapped" tomatoes.
Order: Case dismissed.

Outline of Facts

The broker in this case received from complainant a wire quoting prices on tomatoes. He thereupon on respondent's behalf wired complainant an offer of $1.25 f.o.b. for sizes 6 x 7, straight pack. Complainant confirmed the order as follows: "Six sevens double wrapped bottom layer otherwise straight pack * * *." The broker issued its standard memorandum of sale wherein the commodity was described as "1 car US #1 tomatoes 6 x 7s straight pack, 640 lugs, bottom layer double wrapped, price 1.25 FOB."

Upon arrival of the car at Minneapolis, respondent refused to accept the shipment assigning as reasons for such refusal to accept that the tomatoes were not straight pack and that the two bottom layers contained two tomatoes wrapped in one paper wrapper and that the shipment did not conform to specifications. Shipping point inspection certified the pack as "Mostly fairly tight, many loose within layers. 1/2 to 1 1/2, mostly 1 inch bulge. Bottom layer double wrap pack" and that the lot graded U.S. No. 1. Upon arrival at Minneapolis the tomatoes were inspected by respondent who stated that the tomatoes in the bottom layer of each lug were wrapped two tomatoes in one paper; that such wrapping also extended to a considerable portion of the second layer in each lug examined; and that the tomatoes were not straight pack and were bridge pack. The witnesses brought out that a 6 x 7 straight pack would contain four tiers each, six one way by seven the other way, and that a bridge pack would contain several layers of uneven pack with a larger number of tomatoes, and that a straight pack is of more value than a bridge pack. Neither the buyer nor the broker understood what "bottom layer double wrapped" meant. Apparently they thought that the phrase meant that tomatoes in the bottom layer would be wrapped with two papers.

The respondent secured the inspection of the tomatoes by an inspector of the Minnesota State Department of Agriculture who advised that the tomatoes did not comply with the specifications stated in the broker's confirmation of sale. The Minnesota State Department inspector certified that "In practically all lugs tomatoes in bottom layers wrapped 2 tomatoes in one wrapper * * *."

Ruling included in Decision

1. The respondent secured the opinion of the State of Minnesota Department of Agriculture and from all the facts and information honestly believed that the tomatoes did not conform to sale specifications in the particulars above noted. Respondent's failure to accept the shipment did not amount to a rejection without reasonable cause within the meaning of the statute, and therefore the case was dismissed.

S-771, July 24, 1934, Docket 834: (Hearing)

H. A. SPILMAN, WASHINGTON, D.C. vs. C. J. BUTLER, OMAHA, NEBRASKA.

Violation charged: False and misleading statement.
Principal points involved: Was seller led to believe that a binding contract had been entered into; did broker's failure to inform seller that onions were wanted for storage amount to false and misleading statement?
Order: Case dismissed.

Outline of Facts

Respondent received an inquiry from the Witwer Grocery Company, of Cedar Rapids, Iowa, concerning the purchase of onions which would be suitable for storage for a period of about thirty days, and then wired the United Marketing Exchange, of Delta, Colo. for a quotation of prices, who quoted prices on a carload of U.S. No. 1 onions. Respondent then placed an order for the Witwer Grocery Company of the onions described and at the price quoted by the United Marketing Exchange, but did not advise the shipper that the buyer desired the onions for storage. Complainant charged that respondent had not obtained from the Witwer Grocery Company a signed confirmation or memorandum of sale and had failed to secure the execution of a valid and binding contract by the Witwer Grocery Company; that the representations of the respondent to the United Marketing Exchange led the United Marketing Exchange to believe that a valid and binding contract had been entered into with the Witwer Grocery Company; that specifications conveyed by respondent to the United Marketing Exchange "were so entirely at variance to the stipulations made by the buyer to the respondent and accepted by the respondent but not conveyed by him in any manner to the United Marketing Exchange" as to constitute a false and misleading statement for a fraudulent purpose in violation of Section 2 of the Act.

The seller testified that Butler had represented him for years; that it was customary for him to confirm orders and ship cars on basis of telegraphic instructions from Butler; that he had not instructed Butler to get signed confirmation. Respondent did not represent to seller that such confirmation had been secured. The buyer testified he told the broker he could use the car if the onions would store for thirty days, this appearing to be the expression of a desire rather than the imposing of an additional specification. The onions were US-1 well matured, bright and clean and apparently suitable for storage although how long they could be stored would be largely speculative.

Rulings included in Decision

1. Since the seller had not been requiring signed confirmations and since respondent did not represent that he had secured such a signed confirmation or issued a memorandum of sale the seller was not led to believe a valid and binding contract had been entered into with the buyer.

2. Failure of respondent to notify seller of buyer's wish that the onions be suitable for storage was not a false and misleading statement within the meaning of the Act.

S-772, July 17, 1934, Docket 899: (Hearing)

H. D. SOJOURNER & COMPANY, HOPEWELL, MISS. vs. SILVER BROS. COMPANY, MANCHESTER, N.H.

Violation charged: Failure truly and correctly to account.
Principal point involved: Buyer's acquiescense in broker's action precluded him from rejecting f.o.b. shipment.
Order: Reparation awarded complainant in the sum of $162.30, with interest.

Outline of Facts

Complainant alleged that it sold to respondent one carload of U.S. No. 1 tomatoes at 65¢ per lug, f.o.b. and that respondent accepted the shipment but failed to pay the full purchase price thereof, having paid to complainant the sum of $260.20 which was accepted on account, leaving a balance of $162.30, the original purchase price of the car having been $422.50.

The broker's memorandum of sale stated that the car was to be U.S. No. 1 Green Wrapped Tomatoes well packed branded lugs 6x7 size, 650 lugs at 65¢ per lug f.o.b., that it was a rolling car and the terms were given as payable "On arrival". Mr. Henry Silver of respondent firm, who made the negotiations with the broker, stated that he agreed to take the car at $1.05 delivered; that he did not buy on an f.o.b. basis; that he did not see the memorandum of sale prepared by the broker until produced at the hearing. However, when asked if he had received an invoice from Sojourner which showed a basis of 65¢ f.o.b., he said: "I imagine so", and when asked if he made any complaint about the price of 65¢ f.o.b. he said: "I do not think so." The broker testified that at first Silver Brothers' price was five cents less than the price quoted by Sojourner and that he himself agreed with Sojourner for the additional five cents and changed the terms from a delivered basis to an f.o.b. sale and that he "took a chance" that Silver Brothers might reject at the price. He said that he had tried to contact Silver Brothers at the time but could not; that immediately after drawing up the memorandum of sale he mailed a copy of it to the Manchester office of Silver Brothers; that Silver Brothers knew that the car was a roller within a few hours after it was diverted.

Shipping point inspection showed the tomatoes met the specification of the contract and graded U.S. No. 1. Four days after the arrival an appeal inspection was made to determine if the shipping point certificate was in error or not. This inspection stated under "Quality" that the "Stock is clean, mostly well formed and smooth, many fairly well formed and fairly smooth. Defects within the tolerance for U.S. No. 1 grade." and under "Grade" stated: "Stock does not now meet requirements of U.S. No. 1 grade only account condition factors noted above " (factors given under Condition). Under "Remarks" the following appeared: "This certificate covers an appeal inspection of the above mentioned car which was previously inspected and reported on joint Federal and State of Mississippi certificate which is hereby sustained as to permanent factors of grade." Respondent's defense rested primarily upon the alleged bad condition of the tomatoes upon inspection at destination and secondarily upon the fact that complainant accepted a check for less than an amount called for by the contract of sale.

Rulings included in Decision

1. Respondent unquestionably knew of the terms of the contract while the car was enroute, which would have given it an opportunity to repudiate the agreement made by the broker. However, having accepted the memorandum as the agreement between the parties and the inspections having shown the goods complied with the memorandum at shipping point, respondent was not justified in rejecting the car on account of condition or expecting complainant to share in the loss.

2. The check for $260.20, which respondent claimed was in full payment, bore no notation to that effect nor was the letter by which the check was transmitted explicit upon that point. Assuming that the complainant was entitled to receive the purchase price of the car - $422.50 - only a definite statement of conduct indicating an intention to receive a lesser amount in full would relieve the respondent of the obligation of paying the full contract price.

3. Reparation was awarded complainant in the sum of $162.20, with interest, the difference between the total purchase price of $422.50 and the amount of the check which respondent remitted to the complainant in the sum of $260.20.

S-773, July 30, 1934, Docket 1188: (Hearing)

LEWIS D. GOLDSTEIN, PHILADELPHIA, PA., vs. CLOWE & DAVIS, WASHINGTON, D.C.

Violation charged: Rejection without reasonable cause.
Principal points involved: "Strictly good quality" cantaloupes; salable stock.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent, through its broker, one carload of cantaloupes. The memorandum of sale issued by the broker described the sale as "one car strictly good cantaloupes 'Twin Seven Brand' * * * to arrive Washington, D.C. early Monday or sooner". The broker in explanation of the phrase "strictly good quality" stated that the respondent wouldn't buy U.S. No. 1 grade cantaloupes because that grade didn't mean good eating quality, that during that season practically none of the western cantaloupes were good eating quality and the respondent therefore wanted "strictly good quality" meaning good eating quality, reasonably sweet, and reasonably good flavor. Upon arrival of the car Federal inspection showed that it graded U.S. No. 1 but respondent inspected the car and stated that there was no objection to the cantaloupes except as to taste and that they were tough and had a bitterish tangy taste, with no sweetness whatever. Respondent rejected the shipment.

Ruling included in Decision

1. The purchase was not made on the basis of U.S. No. 1 grade nor was there any warranty as to sugar content, except as the warranty "strictly good quality" might apply thereto. The cantaloupes were purchased for resale. If they were "tough" and had a "tangy taste" instead of an agreeable flavor, they could hardly be considered edible and salable stock. Therefore, the cantaloupes tendered by complainant were not "strictly good quality" and respondent's refusal to accept the shipment was not without reasonable cause. The case was dismissed.

S-774, August 3, 1934, Docket 869: (Hearing).

GULF VEGETABLE & FRUIT CO., INC., WESLACO, TEXAS, vs. SAN PAT VEGETABLE CO. SINTON, TEXAS.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Use of second hand sacks for carrots when new sacks specified.
Order: Reparation awarded complainant in the sum of $316.25, with interest.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of 253 100-pound sacks of carrots at 90¢ per sack, f.o.b. Sinton, Texas, or $227.70, which amount complainant paid to the respondent. The respondent contracted to pack the carrots in new sacks but instead used second hand sacks which caused the rejection of the carrots upon reaching the Canadian border. The carrots were to be shipped from Sinton, Texas by respondent to the complainant at Winnipeg, Manitoba, Canada, in foreign commerce but were refused entry into Canada upon reaching the line under the Canadian quarantine regulations. This was due to the fact that there had been an outbreak of the foot and mouth disease in one or more of the Western or Southwestern states shortly before the carrots were shipped and because they were packed in second hand sacks which originally contained bran, shorts and other miscellaneous commodities. The complainant had a valid contract to sell the carrots to the Grant Distributing Co. Limited, of Winnipeg, at $1.25 per cwt. on the 253 sacks or $316.25, in which amount complainant requested reparation in view of the fact that the carrots were finally resold for transportation charges.

Respondent contended that the sale was a cash track sale; that complainant was advised to have an agent present when the carrots were being loaded for the purpose of inspecting and accepting same before placing them in the car; that during the loading operation the complainant's agent was at all times present during the entire loading and had opportunity to and did fully inspect the carrots and accepted the same for his principal, the complainant; that complainant paid the respondent the sum of $227.70 and this being a sale f.o.b. Sinton, Texas, the transaction was completed and title at once passed to the complainant, the purchaser.

Ruling included in Decision

1. Respondent contracted to pack the carload of carrots in new bags but used second hand bags which resulted in the rejection of the carrots upon reaching the Canadian border causing damages to the complainant in the sum of $316.25. Reparation was awarded complainant in that amount, plus interest.

S-779, Aug. 9, 1934, Docket 1224: (S.P.)

PALMER C. OLSON, ST. ANSGAR, IOWA, vs. KANSAS CITY FRUIT & PRODUCE CO., and/or FLOYD O. KYTE, KANSAS CITY, MO.

Violation charged: Rejection without reasonable cause.
Principal point involved: Insufficient evidence of valid contract.
Order: Case dismissed.

Outline of Facts

Complainant shipped a carload of onions from St. Ansgar, Iowa to the Kansas City Fruit & Produce Co. based upon representations made by Floyd O. Kyte, broker, that the above company had agreed to purchase the onions. Complainant contended that there was a contract of sale and that respondent rejected the car upon arrival whereupon complainant resold it and was damaged in the sum of $90, the difference between the original price of the car and the resale price. The Kansas City Fruit & Produce Co. contended that it did not purchase the car but upon being advised by a representative of the broker that a car of onions was coming to Kansas City "we told him to keep us in mind when the car arrived and to notify us; we would then make an inspection of the car with the purpose in mind of purchasing it providing price and quality was satisfactory"; that no document was furnished that would indicate that a sale was made; that upon arrival of the car it was inspected and found not suitable "for our use"; that Mr. Kyte was personally notified; and that a few days after a communication was received from the shipper asking why the car was rejected and he was advised that respondent had not purchased the car. Mr. Kyte contended there was a valid sale and the car was rejected without reasonable cause. The memorandum of sale was signed by Floyd O. Kyte and the negotiations were wholly through him as broker.

Ruling included in Decision

1. Complainant failed to establish by a fair preponderance of the evidence that there was any agreement on the part of the Kansas City Fruit & Produce Co. to purchase the onions and neither the complaint nor the evidence justified a reparation award against the broker. The complaints against both respondents were therefore dismissed.

S-781, Aug. 14, 1934, Docket 1199: (Hearing)

ANGELES BROKERAGE CO., LOS ANGELES, CALIF., vs. S. ALBERTSON CO., INC., BOSTON, MASS.

Violation charged: Failure truly and correctly to account.
Principal point involved: Negligence and poor judgment not mentioned in Act as coming within definition of unfair conduct.
Order: Case dismissed.

Outline of Facts

Complainant entered into a contract with respondent to ship to respondent quantities of oranges to be sold for the account of complainant on a commission basis. Among the cars shipped was the one in question in this complaint. The car upon arrival at Boston was diverted by respondent, without consulting complainant, to J.J. Lane at Bangor, Maine; upon arrival at Bangor it was rejected by H. Tabenken & Co., to whom it had been sold by said Lane; it was then diverted back to Boston by respondent and turned over by respondent to an auctioneer and sold by said auctioneer, which sale netted complainant $67.55.

The arrangement between the parties was roughly that the respondent was to handle the car of oranges for complainant as the agent of the complainant on a 7 percent commission basis with the general powers of an agent, except possibly, and this seemed to be the specific point at issue, that such general agency was limited by the provision that the respondent was not to sell the oranges for less than $2.40 a box. There seemed to be no doubt that if respondent, before diverting the car of oranges from Boston and selling same for less than $2.40 per box, had consulted complainant, the latter's case would fall. In other words, the complaint was based on the fact that respondent violated one of the terms of the agreement and used his own judgment, good or bad, in the disposition of the car.

Ruling included in Decision

1. The facts did not bear out the allegation that respondent failed truly and correctly to account to complainant in connection with this car of oranges. It apparently rendered a true and correct account and made just returns to complainant of all moneys received by it, less legitimate expenses and charges. Respondent may have disregarded instructions and may have acted negligently and with poor judgment, as to which no finding was made, and such conduct may have resulted in a loss to complainant, but negligence and poor judgment are not mentioned in the Act as coming within the definition of unfair conduct. Nor was it shown that respondent failed to "honestly" carry out the contract. No dishonesty or bad faith was apparent in the conduct of respondent. The case was therefore dismissed.

S-783, Aug. 22, 1934, Dockets 923 and 1038: (Hearing)

SYME-SHAFER MERCANTILE CO., COLBY, KANSAS, vs. EDGAR H. ESKEW & SON, LOS ANGELES, CALIF., and E. H. ESKEW & SON vs. MILO FRANK, LOS ANGELES, CALIF., and WITHERS BROS. LTD., FULLERTON, CALIF.

Violation charged: Failure to deliver in accordance with contract.
Principal points involved: Meaning of "fancy" lemons and oranges; necessity for proving damages.
Order: Syme-Shafer Mercantile Co. awarded nominal damages of $1.00 against Edgar H. Eskew & Son and case of E. H. Eskew & Son vs. Milo Frank and Withers Bros. Ltd. dismissed.

Outline of Facts

The Mid West Brokerage Co., acting for complainant, wired Edgar H. Eskew & Son to ship as soon as possible to Colby, Kansas, 150 boxes of fancy cured wrapped sized lemons and 301 boxes of fancy wrapped sized good color Valencia oranges. Eskew replied by wire the following day agreeing to fulfill the order for the lemons as nearly as possible and the Valencia oranges as ordered. Eskew obtained the oranges and lemons from Withers Bros. through Milo Frank, a broker, who inspected the fruit before it was shipped. Eight days after the car arrived at destination a Federal inspection was secured which stated as to the lemons that "stock generally scarred and presenting a rough unattractive appearance" and as to the oranges that the "lot fails to grade either U.S. Fancy or U.S. No. 1 account percentage of defects in excess of tolerance for the respective grades." Syme-Shafer had already paid $1679.75 for the car, but contended that the quality was inferior and not as ordered.

Syme-Shafer Mercantile Co. based their claim for reparation on the difference between what the commodity would have been worth and the market value as actually delivered, but there was no evidence of what the commodity would have been worth nor of the price per box for which sold, except that the net proceeds were $1763.46. In the same complaint another basis of damages was claimed, namely, the difference between the purchase price and actual gross sales plus one dollar per box lost profit, but the evidence of gross sales was lacking and there was no way of determining how the one dollar per box lost profit was arrived at. Subsequent to the arrival of the car the Mid West Brokerage Co. advised Eskew that $2.00 a box allowance was expected.

Eskew relied upon the testimony of Frank and Withers. Milo Frank testified that when the lemons were shipped there was no discoloration; that it would be possible to acquire discoloration during shipment; and that the oranges were salable grading, at least, 85% U.S. No. 1 or better. F. M. Withers testified, among other things, that this was merchantable fruit and that other shipments of the same class of fruit as was packed in the car in question were being made at this time with no complaints.

No objection was made by Eskew to the specification made in the telegram from the Mid West Brokerage Co. of "fancy cured lemons" and "fancy wrapped sized good color quality Valencias". In the absence of standard or of additional specifications in the particular contract the meaning of the word "fancy" is somewhat indefinite. There is no U.S. grade of this kind on lemons and the grades on oranges are U.S. Fancy or U.S. No. 1. Where the word is used in the U.S. Standards for other commodities it calls for something better than U.S. No. 1 as the reference here to the orange grades clearly indicates. The complainant did not specify U.S. grades on either lemons or oranges.

Rulings included in Decision

1. While the term "fancy" as used by the trade may not have as specific a meaning as it has in the official U.S. grades it is believed that its long use by the industry to denote superior quality and its use in the official standards now in general use to indicate a quality better than U.S. No. 1 warrant the conclusions that the lemons in this case which were "practically all rough or scarred, many scars grayish black discoloration, some also show dry brownish discoloration (apparently sunburn)" and oranges which were only 85% U.S. No. 1 quality did not meet the specification of the contract. Complainant, Syme-Shafer Mercantile Co., produced no evidence as a basis upon which to compute damages and therefore nominal damages only in the sum of $1.00 were awarded against E.H. Eskew & Son.

2. The complaint of E.H. Eskew & Son against Milo Frank and Withers Bros. Ltd. was dismissed.

S-785, Docket 1323, August 29, 1934 (S.P.)

C.M. SECKER BROKERAGE COMPANY, DETROIT, MICH., vs. A. BURKER & CO., INC., BALTIMORE, MD.

Violation charged: Failure to pay brokerage.
Principal point involved: In the absence of any agreement to the contrary brokerage fee is customarily paid by the seller and not the purchaser.
Order: Reparation awarded complainant in the sum of $50, with interest.

Outline of Facts

Respondent employed complainant as its broker to negotiate the sale of two carloads of peaches. Complainant complied with the instructions of the respondent in negotiating the sale to the purchaser but respondent refused to pay the brokerage fee of $25 per car, stating that he did not agree to pay the complainant brokerage and that complainant should have arranged with the buyer to pay this fee.

Ruling included in Decision

1. In the absence of any agreement to the contrary, the usual and customary brokerage charge is $25.00 for each carload of peaches sold and such brokerage fee is ordinarily and customarily paid by the seller and not the purchaser. Reparation was therefore awarded complainant in the sum of $50.00 with interest.

S-788, August 31, 1934, Docket 1180: (Hearing)

MANZO BROTHERS & CO., CHICAGO, ILL., vs. PUGET SOUND VEGETABLE GROWERS ASSOCIATION, SUMNER, WASHINGTON.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Shipping point inspection certificate protected seller on f.o.b. sale.
Order: Case dismissed.

Outline of Facts

Respondent sold complainant through a broker one car of Washington, First Pick Brand, U.S. No. 1, 30 pound cellophane crate, telephone peas, 65¢ f.o.b. top ice extra. Federal inspection was made at point of shipment and the car graded U.S. No. 1. Upon arrival of the car a doorway inspection was made by an employee of the complainant and this inspection indicated the peas were U.S. No. 1. However, the peas arrived too late for the Saturday morning market and the car was not broken until Monday morning at 5 A.M. Upon arrival of the first load at the store of complainant it appeared that the grade of peas varied and complainant immediately ordered Government inspection on the car. This appeal inspection was made by two inspectors who issued a certificate indicating that the car as a whole failed to grade U.S. No. 1 on account of the high percentage of defects in many crates.

The record clearly showed that the sale was made on an f.o.b. shipping point basis and that the respondent had the peas inspected by a Government inspector and that they graded U.S. No. 1. The complainant alleged that the respondent failed to make delivery without reasonable cause as set forth in Section 2 of the Act.

Ruling included in Decision

1. Respondent's action in securing Government inspection and the Government inspection showing the peas to grade U.S. No. 1 indicated that the respondent used reasonable care in the delivery of this car and it could not be held that respondent failed to deliver without reasonable cause. The case was therefore dismissed.

S-789, Sept. 1, 1934, Docket 1333: (S.P.)

RANDOLPH MARKETING COMPANY, INC., LOS ANGELES, CALIF. vs. LERNER FRUIT & PRODUCE CO., ST. LOUIS, MO.

Violation charged: Rejection without reasonable cause.

Principal points involved: Definite terms should govern rather than indefinite terms; "good quality" cauliflower indefinite term.

Order: Reparation awarded complainant in the sum of $207.61, with interest.

Outline of Facts

Complainant sold respondent, through a broker, a carload of cauliflower to grade 85% U.S. 1 "good quality". Federal inspection at shipping point showed that the cauliflower was 85% U.S. 1 and Federal inspection certificate at point of delivery reported the car as grading 60% U.S. 1 only on account of condition, but confirmed the shipping point certificate as to permanent factors of grade. Respondent contended that the car was not "good quality" stating: "We may have gotten the '85% U.S. #1' but we certainly failed to get the 'Quality is Good' * * *". The car was rejected by respondent and complainant resold, receiving a resale net price of $78.39.

Ruling included in Decision

1. Definite terms should govern rather than indefinite. The terms "85% U.S. 1" has a definite fixed meaning and the term "good quality" is indefinite without any fixed meaning. The cauliflower graded 85% U.S. 1 and therefore conformed to the specifications of the contract of purchase and sale. Reparation was awarded complainant in the sum of $207.61, with interest, being the difference between the original price $286.00, and the resale price of $78.39.